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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BARRY SPENCER,

Defendant and Appellant.

D048546

(Super. Ct. No. SCN203697)

APPEAL from a judgment of the Superior Court of San Diego County,
Runston G. Maino, Judge. Affirmed.

A juror in this case was guilty of misconduct when the juror gave verbal encouragement to the principal prosecution witness, a young robbery victim, when the two shared an elevator during the course of the trial. However, where, as here, the juror's encouraging statements were innocuous and in fact the witness did not respond to the statements, the presumption of prejudice which arose by virtue of the misconduct was successfully rebutted. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

At around 2:00 a.m. on March 12, 2005, Amy Roberts was working as a clerk at a 7-Eleven convenience store in Carlsbad. While her back was turned she heard a thump behind her; when she turned around she saw defendant and appellant Barry Spencer behind the counter. Appellant told her "I just want the money." Roberts was scared and shocked; she complied with appellant's demand and emptied the store's cash registers.

After appellant left the store, Roberts called the police who quickly apprehended appellant. Appellant had a large number of small bills in his possession and Roberts identified appellant at the scene of his arrest.

At trial Roberts was the first witness for the prosecution. During a lunch recess, and before Roberts had finished testifying, Roberts and Juror No. 6 were in an elevator together. According to Roberts, Juror No. 6 told her she was doing a good job and spoke very well. Juror No. 6 also made a comment about the length of the questioning. According to Roberts, she did not respond to the juror's statements. Roberts did, however, report the incident to the trial court.

Outside the presence of the other jurors, the trial court voir dired Juror No. 6, who confirmed Roberts's description of their encounter. Juror No. 6, an older woman with white hair, explained: "I thought, for a young girl, she was doing a very good job." Juror No. 6 then adamantly stated she could keep an open mind and she was "impressed with the young girl working at 7-Eleven doing a good job."

The trial court believed the juror's statement that she could keep an open mind. Thus, the trial court denied both appellant's request to discharge Juror No. 6, and, following the jury's guilty verdict, his motion for a new trial.

DISCUSSION

On appeal appellant argues the trial court erred in failing to discharge Juror No. 6 and in thereafter denying his motion for a new trial on the grounds of juror misconduct.

At the time the jurors were sworn in, the trial court instructed them: "[D]on't talk about the case among yourselves or with anyone else." Later, the trial court told the jurors not to speak to any of the witnesses. Thus there is no dispute that, in speaking to Roberts, Juror No. 6 was guilty of misconduct. (*In re Hitchings* (1993) 6 Cal.4th 97, 119; see also *People v. Pierce* (1979) 24 Cal.3d 199, 207; *In re Hamilton* (1999) 20 Cal.4th 273, 294.)

Such misconduct by a juror raises a rebuttable presumption of prejudice. (*In re Hitchings, supra*, 6 Cal.4th at p. 119; *In re Hamilton, supra*, 20 Cal.4th at p. 295.) Where as here, the misconduct involves statements made by a juror to a nonjuror during trial, the prejudice which is presumed is that the juror, in violation of his or her oath, has prejudged the case. (See *In re Hitchings, supra*, 6 Cal.4th at pp. 119-123.)

"This presumption of prejudice ' "may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . ." [Citations.]" (*In re Hitchings, supra*, 6 Cal.4th at p. 119.) "The standard is a pragmatic one, mindful of the 'day-to-day

realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.]

Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.' [Citation.]" (*In re Hamilton, supra*, 20 Cal.4th at p. 296.)

Here, the trial court determined, notwithstanding her statement to Roberts, Juror No. 6 could keep an open mind about the case. In reviewing this finding that the juror's conduct did not prejudice appellant, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Thus we must independently determine whether, from the nature of Juror No. 6's misconduct and all the surrounding circumstances, there is a substantial likelihood she prejudged the case. (*Id.* at pp. 582-583.) Like the trial court, we find no substantial likelihood of such impropriety.

The ultimate question which is presented is whether, in light of her statements, Juror No. 6 could maintain an open mind throughout the remainder of the trial. According to the trial court, Juror No. 6 was adamant in stating that she could maintain an open mind. We of course are bound by the trial court's finding as to the relative strength of Juror No. 6's conviction. (See *People v. Nesler*, *supra*, 16 Cal.4th at p. 582.) The more pertinent question—whether the juror's statement accurately reflected the juror's ability to maintain an open mind—depends on a review of the surrounding circumstances.

From our perspective, the most telling circumstance is the entirely innocuous and quite frankly, understandable, nature of Juror No. 6's misconduct. A young victim of a frightening robbery testified confidently and articulately at the trial of the perpetrator; a short time later an older woman who witnessed the testimony yielded to instinct and offered the young crime victim moral support and comfort. In this context Juror No. 6's statement was no more than a reflection of the obvious impact Roberts's testimony had on her. Wisely, all the law requires in these circumstances is what, as a practical matter, it can require from frail human beings: that notwithstanding the impact of evidence as it is presented, jurors keep an open mind until the case is submitted to them. (See CALJIC No. 50.) Here, in light of the innocuous and understandable sentiments expressed by Juror No. 6, we conclude that like any other juror who listened to Roberts's testimony, Juror No. 6 could thereafter continue to perform her obligations as a juror.

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.